R SIVABALAN A RAMIAH & ANOR v. ZAMBERI MD ISA

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
NALLINI PATHMANATHAN JCA
MARY LIM JCA
[CIVIL APPEALS NO: P-02(NCVC)(W)-134-01-2017
& P-02(NCVC)(W)-135-01-2017]
29 JANUARY 2019

LAND LAW: *Indefeasibility of title and interests – Registered title – Fraud – Whether title obtained through fraud – Buyer purchased subplots of land from seller who was never registered owner – Whether seller could pass interest in land to buyer – Whether buyer could assert entitlement to land against true registered owner – Whether buyer fell within proviso to s. 340(3) of National Land Code – Whether registered owner party to fraud – Whether registered owner's title defeasible – Whether registered owner's title could not be set aside – Whether buyer's interest acquired by void instrument – Whether buyer aware he had not acquired registered title – National Land Code, s. 340(2)(b) & (c)*

LIMITATION: *Actions in contract and tort – Accrual of cause of action – When time began to run – When claimant suffered actual loss – Whether action filed outside limitation period of six years – Whether claim time-barred*

A piece of land ('Lot 937') was owned jointly in half shares by one Venkatachalam Chettiar ('Venkatachalam') and one Swaminathan Chettiar ('Swaminathan'). As of 30 December 1998, one half share belonging to Venkatachalam had been transferred in four equal shares to the beneficiaries of his estate, namely Swaminathan, Swetharanyam, Lakshmanan and Chidambaram Chettiar ('the four registered co-owners of a half share'). Subsequently, a search on the title of Lot 937 disclosed that the status of the registered owners had changed, whereby one Osman Jan ('Osman') became the registered owner of a half share in the land, while the four registered co-owners owned the other half. This transfer to Osman was registered together with a vesting order dated 11 April 2001. On 23 May 2002, one Rosni Ismail ('Rosni') purchased Osman's newly acquired half share in Lot 937. This sale was never registered and Rosni's name was never registered pursuant to the sale and purchase agreement. Nonetheless Rosni, of his own accord, divided Lot 937 into individual private lots to resell. One Zamberi Isa ('Zamberi') purchased few subplots from Rosni. On 6 February 2003, Swaminathan obtained an order from the High Court striking out the vesting order dated 11 April 2001 and re-transferring Osman's half share back into his own name. In the meantime, Zamberi submitted house building plans to the Majlis Perbandaran Pulau Pinang ('MPPP') to build on part of Lot 937, notwithstanding that the portion sold to him had not been registered

in his name. On 16 April 2003, the Land Office re-transferred the half share in Osman's name to that of Swaminathan, thus the title was restored to its true ownership. Swaminathan communicated to the solicitors acting for Rosni and Zamberi, one R Sivabalan ('Siva') and one Sharmni Ramiah ('Sharmni') regarding fraud and forgery perpetrated by Osman. According to Siva, he had sent letters to all purchasers of plots in Lot 937 including Zamberi but the latter denied this. Nonetheless, on 28 May 2003, Zamberi, through Siva's firm, filed a caveat. Subsequently, Rosni offered Zamberi a piece of land in Kulim as a substitute for subplots 16 and 17, the lands purportedly purchased by Zamberi from Rosni. On 5 January 2004, Rosni and Zamberi entered into an agreement whereby the Kulim land was sold to Zamberi as a substitute for the said subplots. By this point, Zamberi was cognizant of the fact that there were prior registered claims in respect of those subplots which precluded his ownership of the same. On 4 December 2006, Zamberi's caveat was removed at the behest of the registered owners of Lot 937. On 27 April 2010, one Shanmugam Kalimuthu ('Shanmugam') purchased Lot 937 from the registered owners (*ie,* Swaminathan and the four registered co-owners) *vide* a sale and purchase agreement. Upon becoming the registered owner, Shanmugam sought possession of Lot 937 but found and alleged that Zamberi had erected a residential premise upon the said land without his and the MPPP's consent. Shanmugam thus issued an eviction and trespass notice on 27 March 2013 to Zamberi to demolish the residential premises and vacate the said land. As a result of Zamberi's failure to comply with Shanmugam's request, Shanmugam filed a suit at the High Court ('the original action') seeking vacant possession. Zamberi then filed a counterclaim, *inter alia*, against Shamnugam, claiming that he was a *bona fide* purchaser for value and thus enjoyed an interest in respect of plot numbers 15, 16 and 17 which was protected under the proviso to s. 340(3) of the National Land Code ('NLC'). As against the lawyers, Siva and Sharmni, he sought general damages for cheating, fraud, misrepresentation, punitive damages and an indemnity or contribution for all his losses. After a full trial, the High Court determined that the original claim by Shanmugam for declaratory relief in relation to his ownership of the land as its registered proprietor be dismissed. Shanmugam's registered title to the land was found to be defeasible and was accordingly set aside in favour of Zamberi. The High Court, in allowing the counterclaim by Zamberi, found that Zamberi was a *bona fide* purchaser for value without notice in respect of the subplots 15, 16 and 17 under s. 340(3) of the NLC and that he was entitled to vacant possession and continued occupation and residence in the house he had built on the land. With respect to the counterclaim by Zamberi against Siva and Sharmni, the High Court found that Siva and Sharmni owed a duty of care, fiduciary duty and statutory duty to Zamberi and were negligent in carrying out the duties owed to Zamberi as his solicitors. Hence, two appeals arose against the decision of the High Court. In the appeal relating to the main claim, Shanmugam sought the intervention of this court to reverse the

decision of the High Court and allow his claim as the registered owner of Lot 937. In the appeal relating to the counterclaim, Siva and Sharmni sought to reverse the finding of the High Court that they were negligent in the conduct of their duties as solicitors. The primary issue of law arising in this latter appeal was that of limitation.

Held (allowing appeals; setting aside orders of High Court)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) Osman had fraudulently emplaced himself on the register of title to Lot 937 as of 11 August 2001 *vide* a vesting order and subsequently sold a half share to Rosni for valuable consideration *vide* a sale and purchase agreement. Rosni was never registered as the owner of a half share of Lot 937 and Zamberi had purchased subplots from Rosni. Firstly, the very fact that Osman obtained title by fraud had tainted the sale to Rosni. It followed that no interest in Lot 937 or any part of it passed to Rosni. As Rosni was never a registered owner and did not acquire any interest in Lot 937, but only an equitable interest pursuant to the sale and purchase agreement, he could not pass any interest in that lot to Zamberi. There was thus never any registration of Zamberi's interest in the land on the title. Zamberi could not therefore assert any entitlement to the land, as against the registered owner, Shanmugam. Zamberi did not fall within the proviso to s. 340(3) of the NLC. (paras 57-65)

(2) Shanmugam was never a party to the fraud perpetrated on Zamberi. Shanmugam obtained his registered title from the original owners of Lot 937, namely Swaminathan by way of half share and the four registered co owners of the other half share, by way of valuable consideration. It was therefore apparent if Shanmugam was never privy to the fraud perpetrated on Zamberi, then Shanmugam's title did not become defeasible simply because a third party like Osman, who had no nexus whatsoever to Shanmugam, perpetrated a fraud on Rosni and thereby Zamberi. There was simply no correlation between the series of events. As such, Shanmugam's title was at all material times indefeasible and could not be set aside in favour of Zamberi. Thus, s. 340(2)(b) and (c) did not come into operation because it could not be said that Shanmugam's registration was obtained by forgery or by means of an insufficient or void instrument. It was in fact Zamberi's 'interest' in the subplots that was acquired by a void instrument. (paras 66-71)

(3) Zamberi was well aware that he had not acquired registered title to subplots 15, 16 and 17 of Lot 937 from Rosni. Zamberi was informed by Rosni in late 2003 that there was a problem with the ownership of Lot 937. There was also a police report by Rosni, produced and admitted during trial by Zamberi, which referred to a letter to the effect that the land sold by Osman did not belong to him. Zamberi also produced and admitted during trial, Siva's letter to MPPP, in which

Siva informed MPPP that Osman obtained his half share by a forged court order. Zamberi's knowledge was fortified by further evidence that there was an agreement entered into between Rosni and Zamberi for the sale of land in Kulim by way of substitute for the sale and purchase agreements in relation to sub-plots 16 and 17. This constituted proof of knowledge and acceptance of the fact that the so-called acquisition of sub-plots 16 and 17 had not been satisfactorily concluded. From the above analysis, the trial judge had erred in concluding that Shanmugam's title was defeasible and that Zamberi was entitled to possession and/or ownership of Lot 937. Thus, this court set aside the High Court's flawed judgment and entered judgment in favour of Shanmugam. (paras 72, 73, 74 & 81)

(4) For the purposes of breach of contract and tort, the limitation period specified is that of six years under the statute. In the instant case, Zamberi did not acquire title to the subplots, far less a half share in Lot 937, premised on the agreements he entered into with Rosni on 30 October 2002 and 10 March 2003. For the purposes of a cause of action in contract, time would have started to run from those dates. Clearly, the present action filed in 2015 was time-barred in contract. With respect to a cause of action in negligence, Zamberi's claim against Siva and Sharmni was also caught by limitation for the following reasons: (i) there was a letter of 25 June 2003 from Zamberi to the local authority in which it was acknowledged that Rosni had no title to the subject land; (ii) otherwise, the date of accrual of the cause of action was when the respondent entered into an SPA with Rosni for the purchase of the Kulim land on 5 January 2004; and (iii) even if Zamberi were given the benefit of the date of acquisition of the Kulim land by the Government on 7 August 2008, which was the date when he lost the chance to replace sub-plots 16 and 17, the original action was filed on 9 February 2015 which was outside the limitation period of six years commencing from the date of loss or the date of damage. Thus, the claim against Siva and Sharmni was caught by limitation. Zamberi's cause of action was thus time-barred. (paras 84-95)

Bahasa Malaysia *Headnotes*

Sebidang tanah ('Lot 937') dimiliki bersama secara pembahagian separuh-separuh oleh Venkatachalam Chettiar ('Venkatachalam') dan Swaminathan Chettiar ('Swaminathan'). Pada 30 Disember 1998, satu separuh bahagian milik Venkatachalam telah dipindah milik dalam empat bahagian yang sama kepada benefisiari-benefisiari estetnya, iaitu Swaminathan, Swetharanyam, Lakshmanan dan Chidambaram Chettiar ('empat pemilik bersama berdaftar setengah bahagian'). Kemudiannya, carian atas hak milik Lot 937 mendedahkan status pemilik berdaftar telah ditukar, dan bahawa seorang bernama Osman Jan ('Osman') adalah pemilik berdaftar separuh bahagian

tanah, sementara empat pemilik bersama memiliki separuh bahagian yang lain. Pindah milik kepada Osman didaftarkan dengan perintah peletakhakan bertarikh 11 April 2001. Pada 23 Mei 2002, bersekali dengan seorang bernama Rosni Ismail ('Rosni') membeli separuh bahagian yang dimiliki Osman dalam Lot 937. Jualan ini tidak didaftarkan dan nama Rosni juga tidak pernah didaftarkan menurut perjanjian jual beli itu. Walau bagaimanapun, Rosni mengikut kehendaknya sendiri, telah membahagikan Lot 937 kepada beberapa lot peribadi individu untuk dijual. Seorang bernama Zamberi Isa ('Zamberi') telah membeli beberapa subplot daripada Rosni. Pada 6 Februari 2003, Swaminathan memperoleh satu perintah Mahkamah Tinggi membatalkan perintah peletakhakan bertarikh 11 April 2001 dan memindah milik semula separuh bahagian Osman kembali bawah namanya sendiri. Pada waktu yang sama, Zamberi mengemukakan pelan pembangunan rumah kepada Majlis Perbandaran Pulau Pinang ('MPPP') untuk membina atas sebahagian Lot 937, walaupun bahagian yang dijual kepadanya tidak didaftarkan bawah namanya. Pada 16 April 2003, Pejabat Tanah memindah milik semua separuh bahagian atas nama Osman kepada nama Swaminathan, oleh itu hak milik telah dipulihkan kepada milikan sebenarnya. Swaminathan memberitahu peguam-peguam yang mewakili Rosni dan Zamberi, R Sivabalan ('Siva') dan seorang bernama Sharmni Ramiah ('Sharmni') berkenaan penipuan dan pemalsuan yang dilakukan oleh Osman. Menurut Siva, dia telah menghantar surat kepada semua pembeli plot-plot dalam Lot 937 termasuk Zamberi tetapi Zamberi menafikannya. Pada 28 Mei 2003, Zamberi, melalui firma Siva, memfailkan kaveat. Seterusnya, Rosni menawarkan kepada Zamberi sebidang tanah di Kulim sebagai ganti subplot 16 dan 17, tanah-tanah yang dikatakan telah dibeli oleh Zamberi daripada Rosni. Pada 5 Januari 2004, Rosni dan Zamberi memasuki satu perjanjian di mana tanah Kulim telah dijual kepada Zamberi sebagai ganti subplot-subplot tersebut. Pada ketika ini, Zamberi menyedari hakikat bahawa terdapat tuntutan berdaftar terlebih dahulu berkenaan subplot-subplot ini yang menghalang milikan atasnya. Pada 4 Disember 2006, kaveat Zamberi dibatalkan atas perintah pemilik-pemilik berdaftar Lot 937. Pada 27 April 2010, seorang bernama Shanmugam Kalimuthu ('Shanmugam') membeli Lot 937 daripada pemilik-pemilik berdaftar (iaitu Shanmugam dan empat pemilik bersama berdaftar) melalui satu perjanjian jual beli. Apabila Shanmugam menjadi pemilik berdaftar, dia menuntut milikan atas Lot 937 tetapi mendapati dan mendakwa Zamberi telah mendirikan premis kediaman atas tanah tersebut tanpa kebenaran Shanmugam dan MPPP. Dengan itu, Shanmugam mengeluarkan notis pengusiran dan pencerobohan pada 27 Mac 2013 terhadap Zamberi untuk merobohkan premis kediaman dan mengosongkan tanah tersebut. Akibat kegagalan Zamberi mematuhi permintaan Shanmugam, Shanmugam memfailkan guaman di Mahkamah Tinggi ('guaman asal') menuntut milikan. Zamberi kemudiannya memfailkan tuntutan balas, antara lain, terhadap Shanmugam, dakwaan dia adalah pembeli *bona fide* untuk balasan bernilai

dan dengan itu menikmati kepentingan atas plot-plot 15, 16 dan 17 yang dilindungi bawah proviso s. 340(3) Kanun Tanah Negara ('KTN'). Terhadap peguam-peguam, Siva dan Sharmni, dia menuntut ganti rugi am untuk perdayaan, penipuan, misrepresentasi, punitif dan indemniti atau sumbangan untuk segala kerugiannya. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan tuntutan asal Shanmugam untuk perisytiharan relief berkaitan milikannya atas tanah sebagai pemilik berdaftar ditolak. Hak milik berdaftar Shanmugam atas tanah itu didapati boleh disangkal dan diketepikan agar memihak pada Zamberi. Mahkamah Tinggi, dalam membenarkan tuntutan balas Zamberi, mendapati Zamberi adalah pembeli *bona fide* untuk balasan bernilai tanpa notis berkenaan sublot-subplot 15, 16 dan 17 bawah s. 340(3) KTN dan bahawa dia berhak mendapatkan milikan kosong dan terus menduduki rumah yang dibinanya atas tanah itu. Berkenaan tuntutan balas Zamberi terhadap Siva dan Sharmni, Mahkamah Tinggi mendapati bahawa Siva dan Sharmni mempunyai kewajipan berjaga-jaga, kewajipan fidusiari dan kewajipan statutori terhadap Zamberi dan cuai dalam menjalankan kewajipan-kewajipannya terhadap Zamberi sebagai peguam-peguamnya. Oleh itu, dua rayuan berbangkit terhadap keputusan Mahkamah Tinggi. Dalam rayuan tentang tuntutan utama, Shanmugam memohon campur tangan mahkamah ini untuk mengakas keputusan Mahkamah Tinggi dan membenarkan tuntutannya sebagai pemilik berdaftar Lot 937. Dalam rayuan tentang tuntutan balas, Siva dan Sharmni menuntut untuk mengakas dapatan Mahkamah Tinggi bahawa mereka cuai dalam menjalankan kewajipan-kewajipan mereka sebagai peguam-peguam. Isu utama undang-undang yang timbul daripada rayuan kedua ini adalah berkenaan had masa.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan-keputusan Mahkamah Tinggi)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Osman telah secara menipu menempatkan dirinya pada pendaftaran hak milik Lot 937 dari 11 Ogos 2011 melalui perintah peletakhakan dan seterusnya menjual separuh bahagian kepada Rosni untuk balasan bernilai melalui perjanjian jual beli. Rosni tidak pernah didaftarkan sebagai pemilik separuh bahagian Lot 937 dan Zamberi telah membeli subplot daripada Rosni. Pertama sekali, fakta bahawa Osman telah memperoleh hak milik melalui penipuan telah menjejaskan penjualan kepada Rosni. Berikutan itu, tiada kepentingan dalam Lot 937 atau mana-mana bahagiannya telah diberikan kepada Rosni. Oleh kerana Rosni bukan pemilik berdaftar dan tidak memperoleh apa-apa kepentingan dalam Lot 937, tetapi hanya kepentingan ekuiti menurut perjanjian jual beli, dia tidak boleh memberi apa-apa kepentingan atas lot itu kepada Zamberi. Dengan itu, tiada apa-apa pendaftaran

berkenaan kepentingan Zamberi dalam tanah itu atas hak milik. Zamberi tidak boleh menuntut apa-apa hak atas tanah itu, terhadap pemilik berdaftar, Shanmugam. Zamberi tidak terangkum dalam proviso s. 340(3) KTN.

(2) Shanmugam bukan pihak dalam penipuan yang dilakukan atas Zamberi. Shanmugam memperoleh hak milik berdaftarnya daripada pemilik-pemilik asal Lot 937, iaitu Swaminathan melalui separuh bahagian dan empat pemilik berdaftar bersama separuh bahagian yang lain, melalui balasan bernilai. Oleh itu, jelas jika Shanmugam bukan privi terhadap penipuan yang dilakukan atas Zamberi, hak milik Shanmugam tidak menjadi boleh disangkal hanya kerana pihak ketiga seperti Osman yang tidak mempunyai apa-apa kaitan dengan Shanmugam telah melakukan penipuan atas Rosni dan Zamberi. Tiada kaitan antara acara-acara yang telah berlaku. Oleh itu, hak milik Shanmugan pada segala waktu material tidak boleh disangkal dan tidak boleh diketepikan untuk memihak kepada Zamberi. Dengan itu, s. 340(2)(b) dan (c) tidak beroperasi kerana tidak boleh dikatakan bahawa pendaftaran Shanmugam diperoleh melalui pemalsuan atau dengan menggunakan instrumen yang tidak cukup atau tidak sah. Sebenarnya 'kepentingan' Zamberi dalam subplot-subplot yang diperoleh melalui instrumen tidak sah.

(3) Zamberi sedar bahawa dia tidak memperoleh hak milik berdaftar atas subplot 15, 16 dan 17 Lot 937 daripada Rosni. Zamberi dimaklumkan oleh Rosni pada akhir tahun 2003 bahawa terdapat masalah dengan milikan Lot 937. Terdapat juga laporan polis oleh Rosni, yang dikemukakan dan diterima masuk semasa perbicaraan oleh Zamberi, yang merujuk pada surat menyatakan bahawa tanah yang dijual oleh Osman bukan miliknya. Zamberi juga mengemukakan dan menerima masuk semasa perbicaraan, surat Siva kepada MPPP, di mana Siva memaklumkan MPPP bahawa Osman telah memperoleh separuh bahagian itu melalui perintah mahkamah palsu. Pengetahuan Zamberi diperkuatkan lagi dengan keterangan lanjut bahawa terdapat perjanjian yang dimasuki antara Rosni dan Zamberi untuk penjualan tanah di Kulim sebagai penggantian perjanjian jual beli berhubungan subplot-subplot 16 dan 17. Ini merupakan bukti pengetahuan dan penerimaan fakta bahawa pemerolehan subplot 16 dan 17 tidak dapat diselesaikan secara memuaskan. Berdasarkan analisis di atas, hakim bicara telah terkhilaf dalam memutuskan hak milik Shanmugam boleh disangkal dan bahawa Zamberi berhak atas milikan dan/atau hak milik Lot 937. Oleh itu, mahkamah ini mengetepikan penghakiman cacat Mahkamah Tinggi dan merekodkan penghakiman memihak pada Shanmugam.

(4) Berkenaan pelanggaran kontrak dan tort, tempoh had masa ditentukan enam tahun bawah statut. Dalam kes ini, Zamberi tidak memperoleh hak milik atas subplot-subplot, lebih-lebih lagi separuh bahagian dalam Lot 937, berdasarkan perjanjian-perjanjian yang dimasuki olehnya dengan Rosni pada 30 Oktober 2002 dan 10 Mac 2003. Berkenaan kausa tindakan kontrak, masa akan mula berjalan dari tarikh-tarikh itu. Jelas sekali, tindakan ini, yang difailkan pada 2015, terhalang oleh had masa dalam kontrak. Berkenaan kausa tindakan kecuaian, tuntutan Zamberi terhadap Siva dan Sharmni juga dihalang oleh had masa atas alasan-alasan berikut: (i) terdapat surat bertarikh 23 Jun 2003 daripada Zamberi kepada pihak berkuasa tempatan yang mengakui bahawa Rosni tidak mempunyai hak milik atas tanah itu; (ii) sebaliknya, tarikh kausa tindakan terakru adalah apabila responden memasuki PJB dengan Rosni untuk pembelian tanah Kulim pada 5 Januari 2004; dan (iii) jika Zamberi diberi manfaat tarikh pemerolehan tanah Kulim oleh Kerajaan pada 7 Ogos 2008, iaitu tarikh apabila dia hilang peluang menggantikan subplot-subplot 16 dan 17, guaman asal difailkan pada 9 Februari 2015 yang di luar tempoh had masa enam tahun bermula dari tarikh kerugian atau tarikh kerosakan. Oleh itu, tuntutan terhadap Siva dan Sharmni dihalang oleh had masa. Kausa tindakan Zamberi terhalang oleh had masa.

Case(s) referred to:

Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
Goh Kiang Heng v. Hj Mohd Ali Hj Abd Majid [1997] 4 CLJ Supp 320 HC ***(refd)***
OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***
Ong Ah Bee v. Hii Chung Siong [1993] 1 CLJ 504 HC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6
National Land Code, s. 340(2)(a), (b), (d)

(Civil Appeal No: P-02(NCVC)(W)-134-01-2017)
For the appellant - Benjamin Sathyanandam & Joshua Narendran; M/s Benjamin & Co
For the Respondent - Fahda Nur Ahmad Kamar & Ariffin Haron; M/s Fahda Nur & Yusmadi

(Civil Appeal No: P-02(NCVC)(W)-135-01-2017)
For the appellant - K Kirubakaran & Noramira Abd Hamid; M/s VM Mohan, Fareed & Co
For the respondent - Fahda Nur Ahmad Kamar & Ariffin Haron; M/s Fahda Nur & Yusmadi

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-184-12-2014 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] There are two appeals before us. Both appeals arise from a single matter in the High Court by way of a claim and a counter-claim. Appeal No. P-02(NCVC)(W)-135-01-2017 ('Appeal No. 135') relates to an appeal by the plaintiff ('Shanmugam') in respect of the main claim, while Appeal No. P-02(NCVC)(W)-134-01-2017 ('Appeal No. 134') relates to an appeal brought by two defendants in the counterclaim, namely the third defendant ('Siva') and the fourth defendant ('Sharmni') who are the partners of a firm of advocates and solicitors.

[2] The two appeals deal with different aspects of the suit brought in the High Court:

(a) In the appeal relating to the main claim, namely Appeal No. 134, Shanmugam seeks the intervention of this court to reverse the decision of the High Court and allow his claim as the registered owner of a piece of land comprising the subject matter of dispute ('Lot 937'). The primary issue of law in this claim turns on indefeasibility of title under s. 340 of the National Land Code ('NLC');

(b) In the appeal relating to the counterclaim, two of the defendants in the counterclaim who comprise partners in a legal firm of advocates and solicitors, seek to reverse the finding of the High Court that they acted in breach of contract and were negligent in the conduct of their duties as solicitors. The primary issue of law arising in this latter appeal, is that of limitation.

[3] In this court, having heard the parties, we allowed Shanmugam's Appeal No. 134, thereby affording him a declaration that he is the registered owner of Lot 937. As for the two defendant solicitors' appeal in Appeal No. 135, we allowed the same determining that the claim brought against them was time barred under the provisions of the Limitation Act 1953 ('Act 254').

[4] It is against these decisions, that the respondent before us, Zamberi bin Md Isa ('Zamberi') seeks leave to appeal to the Federal Court. He was the defendant in the main claim and the plaintiff in the counterclaim in the High Court.

[5] We append below our full reasons for determining as we did.

[6] We commence with the identities of the various parties and the salient facts of the case. We have relied upon, and adopted the outline of facts, as set out by learned counsel for the appellants and the respondent.

A **Parties**

[7] For clarity, the parties in both appeals shall be referred to by their names:

(i) Shanmugam a/l Kalimuthu ('Shanmugam') – the registered owner of
B Lot 937 seeking vacant possession and, as stated above, the plaintiff in the original action; he is also the first defendant in the counterclaim and appellant before us in Appeal No. 135.

(ii) Zamberi bin Md Isa ('Zamberi') – the occupant on Lot 937 who purchased Plots 16 and 17 from one Rosni and later on purchased
C Plot 15 from the heirs or parties related to one Osman bin Jan. He is the defendant in the original action, and the plaintiff in the counterclaim. He is the respondent in both Appeal No. 134 and Appeal No. 135.

(iii) Rosni bin Ismail ('Rosni') – purchased Lot 937 from Osman bin Jan and later divided Lot 937 into individual private plots and sold two of those
D sub-plots to Zamberi. He is the second defendant in the counterclaim. Zamberi obtained judgment in default against him in the counterclaim.

(iv) R Sivabalan a/l A Ramiah (Siva) & Sharmni d/o Ramiah (Sharmni) – Siva acted as the solicitor in three sale and purchase agreements between Rosni and Zamberi as well as between three other persons (Maimunah
E binti Abd Rahman, Halimah binti Abd Rahman and Jamil bin Osman) and Zamberi. Sharmni is his partner in a legal firm. They are the third and fourth defendants in the counterclaim and are the appellants in Appeal No. 134.

F (v) Noorhesham bin Bahari (Noorhesham) – he sought to assist Zamberi and did so by organising a second sale of the arbitrarily divided Lot 937 into Lots 15, 16 and 17 to Zamberi. He is the fifth defendant in the counterclaim.

Chronology Of Salient Events

G **[8]** Prior to 30 December 1998, the title details of Lot 937 disclosed that the property was owned jointly in half shares by one RMSVP Venkatachalam Chettiar s/o Subramaniam Chettiar ('Venkatachalam Chettiar') and RMSPSM Swaminathan Chettiar s/o Subramaniam ('Chettiar Swaminathan Chettiar').

H **[9]** As of 30 December 1998, the title details disclosed that the one half share belonging to Venkatachalam Chettiar had been transferred in four equal shares to the beneficiaries of his estate namely Swaminathan, Swetharanyam, Lakshmanan and Chidambaram Chettiar ('the four registered co-owners of a half share').

I

[10] In short, at all material times, the registered owners of Lot 937 comprised the Chettiar family as named above. This is apparent from the title deed.

[11] However, a search on the title of Lot 937 disclosed that the status of the registered owners had changed, whereby one Osman bin Jan became the registered owner of a half share in the land, while the four registered co-owners owned the other half.

[12] This transfer to Osman bin Jan was registered together with a vesting order dated 11 April 2001.

[13] On 23 May 2002 Rosni, the second defendant in the counterclaim brought by Zamberi, purchased Osman bin Jan's newly acquired half share in Lot 937 for a sum of RM213,988 *vide* a sale and purchase agreement of the same date. This "sale" was never registered, and Rosni's name was never registered pursuant to the sale and purchase agreement with Osman bin Jan.

[14] Nonetheless Rosni, of his own accord, divided Lot 937 into individual private lots to resell.

[15] On 30 October 2002, some five months later, Zamberi purchased Lot 17 from Rosni for RM30,000 *vide* a sale and purchase agreement of the same date. This purchase was similarly not registered. It could not be registered as Rosni's purported interest as owner had not been registered. Lot 937 at the time remained in Osman bin Jan's name.

[16] Less than a month later on 20 November 2002, Swaminathan Chettiar, whose name had been replaced by Osman bin Jan's name on the title, commenced an action against Osman bin Jan at the High Court in Penang to strike out the vesting order dated 11 April 2001 and have Lot 937 re-transferred back to his name.

[17] At around the same time, Zamberi began constructing a building on Lot 937.

[18] On 6 February 2003, Swaminathan Chettiar obtained an order from the High Court in Penang striking out the vesting order dated 11 April 2001 and re-transferring Osman bin Jan's half share back into his own name. On the same date, Rosni filed a caveat on Lot 937.

[19] In the meantime, on 6 March 2003 Zamberi, through his solicitors, submitted house building plans to the Majlis Perbandaran Pulau Pinang (MPPP). It was apparent he was proceeding to build on part of Lot 937, notwithstanding that the portion sold to him had not been registered in his name.

[20] On 10 March 2003, Zamberi purchased another sub-plot comprising a part of Lot 937 from Rosni for RM20,000 *vide* a sale and purchase agreement of the same date. Zamberi received a receipt from the lawyers, namely Siva for a sum of RM20,660.

[21] On 16 April 2003, the land office, pursuant to the registration of the order of court of 6 February 2003 re-transferred the half share in Osman bin Jan's name to that of Swaminathan. Therefore, the status of the registered owners as of that date showed that a half share of Lot 937 belonged to Swaminathan and the other half belonged to the four registered co-owners. In short, the title was restored to its true ownership prior to 11 August 2001.

[22] On the same date, ie, 16 April 2003, Swaminathan's solicitors, Messrs Annamalai & Co, communicated to Siva regarding fraud and forgery perpetrated by Osman bin Jan.

[23] According to Siva, he sent letters to all subsequent purchasers of plots in Lot 937 including Zamberi, on 28 April 2003. However, Zamberi denies this.

[24] Nonetheless on 28 May 2003, Zamberi through Siva's firm, filed a caveat. He received a receipt for the sum of RM260,00 from Siva. The caveat was registered on 31 May 2003.

[25] On 16 June 2003, MPPP gave final notice to Zamberi that his house built on Lot 937 would be demolished for failing to submit a plan as required. On 19 June 2003 Zamberi appealed to MPPP. The following day, Rosni gave consent to Siva to write on behalf of Zamberi to appeal to MPPP. Siva then wrote on behalf of Zamberi providing updates on the issue of ownership and appealing for an extension of time in respect of the proposed demolition. (It was clear by now, that Siva was acting for Zamberi.)

[26] In September 2003, Rosni provided refunds or replacement pieces of land to other purchasers of sub-plots in Lot 937.

[27] In January 2004, Rosni similarly offered Zamberi a piece of land in Kulim as a substitute for sub-plots 16 and 17, namely the lands purportedly purchased by Zamberi from Rosni *vide* the sale and purchase agreements dated 30 October 2002 and 10 March 2003. These were the sub-plots so termed by Rosni after he purportedly purchased all of Lot 937 from Osman bin Jan. From the timing of these agreements, it is apparent that Osman bin Jan's name was on the register of title when sub-plot 17 was "sold" by Rosni to Zamberi. By 10 March 2003 however, the High Court in Penang had already, on 6 February 2003, struck out the vesting order and re-transferred that half-share back to Swaminathan Chettiar. The restored title in Swaminathan's name was only registered on 16 April 2003.

[28] On 5 January 2004, Rosni and Zamberi entered into an agreement whereby land in Kulim ('the Kulim land') was sold to Zamberi as a substitute for plots 16 and 17. By this point therefore, it would appear that Zamberi was cognisant of the fact that there were prior registered claims in respect of those plots which precluded his ownership of the same.

[29] On 29 June 2004 Siva wrote to Zamberi advising that Rosni had paid the owners of the Kulim land the full price for the said land and that transfer of ownership to Zamberi could be done soon.

[30] However in 2005, Siva was discharged by Rosni and all legal matters taken over by another firm.

[31] On 4 December 2006, Zamberi's caveat which had been filed on 31 May 2003 was removed at the behest of the registered owners of Lot 937. Zamberi claimed that he was unaware of such removal as no Form 19C had been served on him.

[32] This was followed two years later on 7 August 2008 by the gazetting of the acquisition of the Kulim land by the Government.

[33] On 1 December 2009, Zamberi entered into an agreement with the "heirs" or "successors in title" of Osman bin Jan for the purchase of what is described as Plot 15 for a sum of RM20,000.

[34] Then on 27 April 2010 the current registered owner, Shanmugam, ie, the plaintiff purchased Lot 937 from the registered owners (ie, the Swaminathan Chettiar and the four registered co-owners) *vide* a sale and purchase agreement of the same date.

[35] A search conducted subsequently showed Shanmugam as the sole registered owner of Lot 937. The memorandum of transfer was registered on 8 November 2012.

[36] Upon becoming the registered owner, Shanmugam sought possession of Lot 937 but found and alleged that Zamberi had erected a residential premise upon the said land without his and the MPPP's consent. Shanmugam, through his solicitors, issued an eviction and trespass notice on 27 March 2013 to Zamberi to demolish the residential premises and vacate the said land.

The High Court Claim By Shanmugam And Counterclaim By Zamberi

[37] As a result of Zamberi's failure to comply with Shanmugam's request in the said notice, Shanmugam filed a suit at the High Court of Pulau Pinang in December 2014 (the original action), seeking vacant possession. Zamberi then filed a counterclaim, alleging that Rosni had committed fraud and misrepresentation against him. He made no allegations of fraud or misrepresentation against the then registered proprietors or Shanmugam as the current registered proprietor. Zamberi sought judgment for damages for fraud and misrepresentation, aggravated damages and an indemnity or contribution if he was evicted from the said land and for the loss of his residence. Similar allegations were brought against Noorhesham for fraud and misrepresentation but again, no such allegations were made against Shanmugam.

[38] What Zamberi sought against Shanmugam was that he, Zamberi, was a *bona fide* purchaser for value and thus enjoyed an interest in respect of plot numbers 15, 16 and 17 which was protected under the proviso to s. 340(3) of the NLC. He sought vacant possession and continued occupation in his residence and that the caveat he had lodged be retained. Alternatively, he sought special damages to be borne by Shanmugam for the costs of the building and house on Lot 937, as well as general damages and costs.

[39] As against the lawyers, Siva and Sharmni, he sought general damages for cheating, fraud, misrepresentation, punitive damages, and an indemnity or contribution for all his losses in respect of the loss of his residence.

The Judgment Of The High Court

[40] The High Court determined after a full trial of the action that the original claim by Shanmugam for declaratory relief in relation to his ownership of the land as its registered proprietor be dismissed. In other words, Shanmugam's registered title to the land was found to be defeasible and accordingly set aside in favour of Zamberi.

[41] Her Ladyship allowed the counterclaim by Zamberi. In so far as the claim to Lot 937 was concerned, Her Ladyship found that Zamberi was a *bona fide* purchaser for value without notice in respect of the sub-plots 15, 16 and 17 under the proviso to s. 340(3) of the NLC. Accordingly, she ordered that he was entitled to vacant possession and continued occupation and residence in the house he had built on the land. In short, Zamberi's claim was accorded priority over the registered owner of Lot 937, namely Shanmugam.

[42] In so deciding, the court held and reasoned as follows in respect of the disputed issues between the parties:

(i) With respect to the issue of whether Shanmugam was the registered owner of Lot 937 and a *bona fide* purchaser for valuable consideration, the court found that from the evidence adduced, especially the grant/title deed for the said land, Shanmugam is the registered owner of the said land.

However, Her Ladyship went on to find that Zamberi's testimony that he had no knowledge of the removal or withdrawal of the private caveat was not rebutted by Shanmugam. She further found that there was no evidence proving that there was service of the notice of intention to remove the private caveat issued to Zamberi by the land office. The court held that the onus lay on Shanmugam to prove that Zamberi had knowledge of the removal of the private caveat.

Her Ladyship then reasoned that as such Zamberi retained an interest in the land according him the right to stay on the said land. As such Zamberi, it was held, was not a squatter on Lot 937.

(ii) With respect to the issue of indefeasibility of title *vis a vis* Shanmugam and the claim by Zamberi, the court explored s. 340 of the NLC and concluded that it was in fact Zamberi who was a *bona fide* purchaser. Her Ladyship premised this finding of both fact and law by relying on the second tranche of sale and purchase agreements Zamberi had entered into in 2009. She relied on the fact that Zamberi had used the services of Noorhesham who claimed to be a lawyer, and had offered Zamberi his legal service to resolve the issues regarding the sale and purchase of the said land.

[43] Through Noorhesham, Zamberi had signed a second tranche of the sale and purchase agreements. The first was dated 1 December 2009, purportedly for the purchase of plots 16 and 17 from the "legal heirs" of Osman bin Jan. Zamberi had also entered into another sale and purchase agreement for plot 15 prepared by Noorhesham for a consideration of RM20,000.

[44] Her Ladyship then referred to a number of cases including *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 and *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949; [1999] 2 MLJ 511. She then determined that Shanmugam was the immediate purchaser of Lot 937. As such, she reasoned that Shanmugam enjoyed an immediate interest in Lot 937 which is defeasible, and could be set aside by a subsequent *bona fide* purchaser for value without notice pursuant to the proviso to s. 340(3) of the NLC.

[45] Zamberi, Her Ladyship found, was such a subsequent purchaser who was *bona fide*, and had provided valuable consideration. As such, she reasoned that he acquired indefeasible title to Lot 937. Her reasons for concluding that Zamberi was a *bona fide* purchaser for value without notice included the following:

(i) Zamberi had entered into a valid sale and purchase agreement with Rosni for the purchase of plots 16 and 17 for a total purchase price of RM50,000. Zamberi had also signed the sale and purchase agreement to purchase Plot 15 with Noorhesham for a consideration of RM20,000;

(ii) A search at the land office showed that Osman bin Jan was the registered owner of the half share of the said land;

(iii) Zamberi was not involved in any of the acts of Rosni, Siva and Sharmni with regard to the sale and purchase of Lot 937;

(iv) There is no evidence to show that Zamberi had knowledge of the irregularities of the ownership of the said land when Zamberi signed the sale and purchase agreement with Rosni;

(v) Zamberi relied completely on the representation given by Rosni and Siva pertaining to the said land.

[46] With respect to the counterclaim by Zamberi against Siva and Sharmni, which comprises the subject matter of Appeal Number 134, the High Court found that Siva and thereby Sharmni, as his partner in the legal firm:

(i) did in fact represent Zamberi and that a solicitor-client relationship subsisted between them. There was sufficient documentary evidence, which the court alluded to, to substantiate this;

(ii) owed a duty of care, fiduciary duty and statutory duty to Zamberi;

(iii) were negligent in carrying out the duties owed to Zamberi as his solicitors. They had also committed fraud and/or misrepresentation. The basis for so concluding was that the firm had failed to ascertain whether Rosni was the registered owner of the said land in Kulim, before proceeding with the sale and purchase transaction;

(iv) had failed, refused, neglected and/or by fraud or misrepresentation failed to inform Zamberi of the effect of the letter from Messrs Annamalai & Co. The letter advised of the fraud and forgery perpetrated by Osman bin Jan;

(v) had negligently allowed Zamberi to submit plans to build his residence on Lot 937 to MPPP and misled Zamberi by representing that all issues in relation to Lot 937 would be resolved;

(vi) had prepared the sale and purchase agreement for a substitute property, namely the land in Kulim, to resolve the issue of ownership of Lot 937; and significantly that;

(vii) Zamberi's claim was still within the limitation period of six years in relation to his claim against Siva and Sharmni in negligence, as he suffered actual loss on 7 January 2013 when the ownership of the said land was transferred to Shanmugam on that date.

[47] It is this last issue of limitation that is of relevance for the purposes of Appeal No. 134. This is because we reversed Her Ladyship's finding and concluded that the claim against the solicitors was in fact time barred. That precluded the necessity to deal with the other issues.

[48] In concluding the trial in the High Court, Her Ladyship awarded general damages of RM200,000 to Zamberi and costs of RM30,000 and disallowed the claim for exemplary damages.

Our Decision

[49] In his original claim, Shanmugam sought vacant possession of the property registered in his name. That in turn entailed demolishing of the house constructed by Zamberi.

[50] From the chronology of the relevant facts, it is evident that Shanmugam is the registered owner of Lot 937 having acquired the whole property by way of a half share from Swaminathan Chettiar and the remaining half share from the four registered co-owners. The transfer was based on valuable consideration. To that extent the transaction is a straightforward sale from one registered owner to another. Upon paying the full consideration for Lot 937, Shanmugam was registered as the new owner.

[51] There is no issue of fraud or illegality tainting or rendering defeasible such title, as between Shanmugam and the earlier registered owners. Indeed, there is no pleading to that effect by way of the defence and counterclaim filed by Zamberi.

[52] The learned judge framed the issues in dispute as follows:

(i) Whether Shanmugam is the registered owner of Lot 937 and is he a *bona fide* purchaser for valuable consideration?

(ii) Does Zamberi reside on Lot 937 as a trespasser or a squatter?

(iii) Is Zamberi entitled to the counterclaim he brings against Shanmugam for a declaration that he is entitled to reside on the land and damages?

(iv) Is Shanmugam entitled to vacant possession and a cancellation of the caveat as well as damages against Zamberi?

[53] In point of fact, the relevant issues which should have been addressed first was question (d) which would have encompassed (c) and (b). Question (a) is not a question which reflects the true issues between the parties. This is because Shanmugam was clearly (and remains) the registered owner of Lot 937 on the title to the land. The issue of whether he is a *bona fide* purchaser for value without notice does not arise in the context in which he acquired Lot 937 because he acquired it validly and with full consideration from the previous registered owners, as we have explained above.

[54] The central question that actually needs to be addressed, which the learned judge neglected to frame or consider properly, is this:

> What is the nature of Zamberi's interest in Lot 937, if any?

[55] It is important to comprehend the nature of Zamberi's interest, if any, under the law prior to taking the grave step of setting aside Shanmugam's registered title to Lot 937, as the learned judge did. In failing to examine this issue, the learned judge erred.

[56] An examination of the chronology of events discloses that Zamberi actually entered into a sale and purchase agreement with Rosni for sub-plot 17 on 30 October 2002 and for sub-plot 16 on 10 March 2003. The crucial question is whether such entry into these agreements actually bestowed, granted or resulted in Zamberi acquiring an equitable right or interest in Plot 937.

[57] It is a fact that Osman bin Jan appears to have fraudulently emplaced himself on the register of title to Lot 937 as of 11 August 2001 *vide* a vesting order. (That order was subsequently set aside on 6 February 2003, which order was registered on 16 April 2003).

[58] Osman bin Jan then sold a half share to Rosni for valuable consideration, *vide* a sale and purchase agreement. But Rosni was never registered as the owner of a half-share of Lot 937. And Zamberi purchased sub-plots 17 and then 16 from Rosni. What interest did Zamberi acquire?

[59] Firstly, the very fact that Osman bin Jan obtained title by fraud taints the sale to Rosni. It begs the question as to what sort of interest, if at all, in the land was passed to Rosni. It should follow that no interest in Lot 937 or any part of it passed to Rosni. This was confirmed by the subsequent setting aside of the vesting order. That order remains unchallenged by any of the parties here.

[60] But more significantly for the purposes of our NLC, which is based on the Torrens system, Rosni did not at any point of time acquire any title to Plot 937. As such, he was never the registered owner of a half share in Lot 937. So under the NLC, as Rosni's name never appeared on the title as a registered owner of a half-share in Lot 937, he did not become an immediate purchaser whose title was defeasible under s. 340(2)(a). His interest, at best, was a beneficial equitable interest in the half-share.

[61] As his interest never appeared on the register of title, Rosni only acquired a contractual interest pursuant to the sale and purchase agreement he executed with the fraudulent Osman bin Jan on 23 May 2002. Such interest under the contract entitled him to sue Osman bin Jan for the recovery of monies paid. But such interest did not translate to a registrable interest in the land, because his interest was never registered.

[62] As Rosni was never a registered owner and did not acquire any interest in Lot 937, but only an equitable interest pursuant to the sale and purchase agreement, he could not pass any interest in that lot to Zamberi. It is true that in or around 6 February 2003, Rosni lodged a caveat claiming interest to that half share. However, that was on the very day that the High Court in Penang ruled that the vesting order filed by Osman bin Jan was fraudulent or void and set it aside. That reinforces the nature of Rosni's interest as being contractual. He would, at best, only be entitled to a recovery of monies and damages from Osman bin Jan.

[63] Even if it is argued that he became the beneficial owner of that half share prior to the sale to Zamberi, such beneficial ownership meant that Osman bin Jan held the half-share on trust for Rosni. But significantly, any such interest was transient. This is because Osman bin Jan's "title" was set aside one year and eight months later.

[64] Turning to Zamberi who is one step removed from Rosni, once again his recourse lies against Rosni for recovery of the monies paid under the two sales and purchase agreements. There was never any registration of Zamberi's interest in the land on the title. He could not therefore assert any entitlement to the land, as against the registered owner, namely Swaminathan Chettiar at that juncture, and subsequently Shanmugam.

[65] In short, the fact that Rosni did not become the registered owner of a half share in Lot 937 means that he could not pass any title to Zamberi. That fact distinguishes this case from many other cases where a subsequent acquirer of title from the immediate purchaser obtains good title by reason that he is a *bona fide* purchaser for value without notice within the proviso to s. 340(3) of the NLC. In other words, Zamberi did not fall within that proviso.

Section 340(3) And Its Proviso – Is It Applicable To Zamberi In The Present Factual Matrix?

[66] Another crucial distinction that precludes Zamberi from relying on the proviso to s. 340(3) is the fact that Shanmugam was never a party to the fraud perpetrated on Zamberi. As stated at the outset, Shanmugam obtained his registered title from the original owners of Lot 937, namely Swaminathan Chettiar by way of half-share and the four registered co-owners of the other half share, by way of valuable consideration. At no time did Shanmugam become involved or embroiled in the "fraud" perpetrated on Zamberi.

[67] Such fraud arose from a separate or parallel course of events, by reason of Osman bin Jan fraudulently becoming a registered owner of a half share *vide* the use of a vesting order. Osman bin Jan then fraudulently "sold" that half-share to Rosni who on-sold the same to Zamberi. Shanmugam was never a party to, nor privy to any of this fraud.

[68] As such s. 340(2)(a) does not come into play. That statutory provision states as follows:

> … **The title or interest of any such person or body shall not be indefeasible**:
>
> (a) **in any case of fraud** or misrepresentation **to which the person** or body, or any agent of the person or body, **was a party or privy**; or
>
> (b) …" (emphasis added).

[69] It is therefore apparent that if Shanmugam was never privy to the fraud perpetrated on Zamberi, then Shanmugam's title does not become defeasible simply because a third party like Osman bin Jan who has no nexus whatsoever to Shanmugam perpetrated a fraud on Rosni and thereby Zamberi. There is simply no correlation between the two series of events.

[70] As such, Shanmugam's title is and was at all material times indefeasible and could not be set aside in favour of Zamberi.

[71] Similarly s. 340(2)(b) and (c) do not come into operation because it cannot be said that Shanmugam's registration was obtained by forgery or by means of an insufficient or void instrument. It is in fact Zamberi's "interest" in the sub-plots that was acquired by way of a void instrument. But as Rosni never acquired title as recognised under the NLC, Zamberi too did not and could not acquire any registrable interest in the land. His interest was confined to the right of recovery of the monies he had paid out by way of consideration for the purchase of the land and damages, that too from Rosni, not Shanmugam.

Zamberi's Knowledge And Acceptance That He Had Not Acquired Registrable Title To Lot 937 Or Any Part Of The Land

[72] The chronology of events discloses that Zamberi was well aware that he had not acquired registered title to sub-plots 17, 16 and subsequently 15 of Lot 937 from Rosni. Zamberi was informed by Rosni in late 2003 that there was a problem with the ownership of Lot 937 (see for example the counterclaim). There is also a police report by Rosni dated 27 May 2003, produced and admitted during trial by Zamberi. The police report refers to a letter dated 16 April 2003, to the effect that the land sold by Osman did not belong to him. Zamberi was also given a letter dated 16 June 2003 by Rosni, in which Rosni undertook to transfer the land to Zamberi after the matter against Osman was settled. Zamberi also produced and admitted during trial, Siva's letter to MPPP in which Siva informed MPPP that Osman obtained his ½ share by a forged court order. That letter was copied to Zamberi.

[73] Zamberi's knowledge is fortified by further evidence the agreement entered into between Rosni and Zamberi on 5 January 2004 for the sale of land in Kulim by way of substitute for the sale and purchase agreements in relation to sub-plots 16 and 17. There was correspondence from Siva, the lawyer and third defendant in the counterclaim brought by Zamberi, confirming that Rosni had paid the full purchase price to the registered owners of the land in Kulim and that the transfer of ownership to Zamberi could be effected shortly. This constitutes proof of both knowledge and acceptance of the fact that the so-called acquisition of sub-plots 17 and 16 had not been satisfactorily concluded.

How Did The Learned Judge Err?

[74] From the above analysis, it was clear to us that the learned judge had erred in concluding that Shanmugam's title was defeasible and that Zamberi was entitled to possession and/or ownership of Lot 937 in priority to the registered owner, Shanmugam.

[75] The learned judge concluded correctly that Shanmugam was a *bona fide* purchaser, and thereby the registered owner of Lot 937. She made no error in so concluding.

[76] However, the learned judge erred in her analysis after this point by concluding that: A

(i) Zamberi had entered a caveat on the register on 28 May 2003, which was well prior to Shanmugam executing the sale and purchase of the subject property on 27 April 2010. She then concluded that Zamberi had protected his "interest" in the land prior to Shanmugam's acquisition of the land. She did note that his caveat was removed on 4 December 2006, but then went on to hold that there was no evidence of notice of removal of the caveat on Zamberi. Her Ladyship then concluded that the burden lay on Shanmugam to prove that the removal of Zamberi's private caveat was done with his knowledge. Therefore, she concluded, Shanmugam had failed to establish this. B C

It is clear that the learned judge erred in concluding that the burden lay on Shanmugam to prove that Zamberi was cognisant of the removal of his private caveat and to establish that the requisite Form 19C had been served on him. The notice of intention to remove the caveat was not undertaken by Shanmugam but brought about at the behest of the original owner of the half-share, but by the land office. D

It was nigh impossible for Shanmugam to prove such a fact and the learned judge was irrational to place such a burden on Shanmugam, who was not the registered owner in 2006 to go back in time to establish a step in the proceedings relating to removal which was within the knowledge of the previous owners and the land office. E

Moreover, a perusal of Zamberi's evidence discloses that his evidence was a bare assertion to the effect that he had not received notice of removal of the caveat. This was clearly insufficient to rebut the fact of removal of the caveat by the previous owners of Lot 937 through the land office. F

Her Ladyship compounded her error by failing to consider the salient factual circumstances such as the fact that Zamberi had already entered into a substitute agreement with respect to the land in Kulim to replace the sub-plots he had purchased from Rosni. In this regard, the learned judge failed to consider the entirety of the evidence or to weigh the same so as to arrive at a reasoned conclusion; G

(ii) The learned judge erred in displacing Shanmugam's registered title in favour of Zamberi's claim to Lot 937. Having reviewed seminal case – law such as *Tan Ying Hong* (above), she erroneously concluded that Shanmugam was the immediate purchaser of Lot 937 within the context of the proviso to s. 340(3) and his interest was therefore defeasible. She then went on to hold that Zamberi thereby obtained indefeasible title as he was a *bona fide* purchaser for value whose interest was statutorily protected *vide* the proviso. H I

[77] As we have stated earlier, the learned judge erred in so concluding as Shanmugam was neither party to, nor privy to the fraud perpetrated by Osman bin Jan on Rosni and thereby Zamberi. Section 340(2) would only have come into play if Rosni had become the registered owner of the half-share in Lot 937, prior to disposing of the same to Zamberi, who then became the deferred *bona fide* purchaser for value without notice.

[78] In the instant case, he did not. In any event, Zamberi can hardly be said to be a *bona fide* purchaser for value without notice, given his acquisition of the land in Kulim from Rosni, and his subsequent purchase of sub-plots from the legal "heirs" of Osman bin Jan. He also failed to renew the caveat that was removed on 4 December 2006, some four years prior to Shanmugam's acquisition of Lot 937. Fortifying this is Zamberi's testimony conceding that he was aware of the fraud as early as 2003.

[79] Zamberi therefore had full knowledge of the fact that he had not acquired indefeasible title to the half share of Lot 937 or any part of it. That in itself precludes him from being characterised as a *bona fide* purchaser without notice of a superior title. The learned judge was, to that extent, partisan in her decision in that she selected only certain parts of the evidence but failed to give consideration to the situation as a whole.

[80] Ultimately, the learned judge's primary error was in applying the principle of deferred indefeasibility in favour of Zamberi and setting aside Shanmugam's registered title because she failed to comprehend or appreciate that Shanmugam was not a part of the chain of fraud perpetrated by Osman bin Jan on Rosni, and thereby Zamberi. Shanmugam purchased Lot 937, as we have said repeatedly, from the registered owners whose title was indefeasible and so upheld by the court, as evidenced by the setting aside of the fraudulent vesting order lodged by Osman bin Jan.

[81] The learned judge also erred in stating that because Shanmugam was aware of Zamberi's property on the land from 2002 onwards, his title was subject to Zamberi's interest which prevailed over the registered title. Again, the learned judge failed to comprehend that as a registered owner, Shanmugam was entitled to vacant possession, and that Zamberi had no registrable interest in the land. Accordingly, her judgment is flawed. We therefore set aside her judgment and entered judgment in favour of Shanmugam granting him vacant possession of Lot 937 and an order for the demolishing of Zamberi's premises.

Zamberi's Counterclaim Against The Third And Fourth Defendants In The Counterclaim, Siva And Sharmni

[82] The first issue that arises for consideration is that of limitation. If the defendants succeed in this aspect of their defence, the fact that they were negligent and/or in breach of their contract with Zamberi as his solicitors becomes academic.

[83] It should be said at the outset, that it is evident from the chronology of events that Siva and thereby Sharmni his partner comprising the legal partnership, certainly had a solicitor-client relationship with Zamberi. This is evidenced by, *inter alia* their conduct of his affairs after the initial sale and purchase transaction with Rosni as we have set out above in the chronology of relevant events.

[84] For the purposes of breach of contract and tort, the limitation period specified is that of six years under the statute. The issue that falls for consideration is this: when does time start running for the purposes of computing this six year period?

(a) When does time start running for the purposes of limitation?

[85] Section 6 of Act 254 states that:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort; …

[86] According to *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784 CA:

> [13] In so far as s. 6(1)(a) of the Limitation Act 1953 is concerned, we are of the view that an alleged cause of action in contract first accrued from the date of the first clear and unequivocal breach of contract, while an alleged cause of action based in tort first accrued when the plaintiff suffers damage.

[87] In that case, a solicitor prepared a loan agreement for the bank who was its client which was signed with the borrower on 6 April 1999. For the purposes of security, the solicitor also prepared a third party assignment, which was executed on the same day. The bank then released the loan. However, the borrower failed to make payment in November 2000, a little over a year later. The bank discovered in April 2004 that the third party assignment was invalid. The bank contended that the cause of action accrued on the day the instrument was discovered to be invalid. It commenced action against the solicitor on 17 March 2006.

[88] It was held that limitation runs from the date on which the cause of action accrues, regardless of when it was discovered. In contract, the date when the cause of action arose was construed as follows. It was the duty of the solicitor to ensure that the loan agreement was secured through a valid assignment. Since the assignment was void at its very inception, the breach of duty accrued when the third party assignment was executed on 6 April 1999.

[89] As for the cause of action in tort, it was held that the appellant would have suffered damage when the third party assignment was executed, because the appellant would have, on that date, been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment. The corollary of this principle is that damage is sustained by a plaintiff once an instrument that imposes a liability on him is executed.

[90] Similarly, in the High Court case of *Ong Ah Bee v. Hii Chung Siong* [1993] 1 CLJ 504, it was held that the claim was time barred on the same reasoning. There the client entered into an agreement with the developer, prepared by the solicitor, on 24 June 1985. It was later discovered that the property was not transferable. The precise date of such discovery is not stipulated in the case. The client sued his solicitor on 18 September 1991. It was held that as the client did not receive that which the solicitor ought to have obtained for him on the date of the execution of the agreement on 24 June 1985, time started to run from that date for the purposes of computing when limitation had set in.

[91] In the instant case, Zamberi did not acquire title to the sub-plots, far less a half share in Lot 937, premised on the agreements he entered into with Rosni on 30 October 2002 and 10 March 2003. For the purposes of a cause of action in contract, time would have started to run from those dates. Clearly, the present action filed in 2015 is time-barred in contract.

[92] With respect to a cause of action in negligence, based on the evidence, Zamberi's claim against the appellants is also caught by limitation for the following reasons:

(i) There is a letter of 25 June 2003 from Zamberi to the local authority in which it was acknowledged that Rosni has no title to the subject land;

(ii) Otherwise, the date of accrual of the cause of action is when the Respondent entered into an SPA with Rosni for the purchase of the Kulim Land on 5 January 2004. Again, by this date he had full knowledge and had accepted that he had not acquired title to the sub-plots purchased from Rosni;

(iii) Even if Zamberi were given the benefit of the date of acquisition of the Kulim land by the Government on 7 August 2008, which is the date when he lost the chance to replace sub-plots 16 and 17, the original action was filed on 9 February 2015 which is outside the limitation period of six years commencing from the date of loss or the date of damage.

[93] The learned judge erred in this context in failing to apply the law correctly to the factual matrix in computing time for the purposes of limitation. She erroneously concluded that time only started to run from that point in time when the plaintiff namely Zamberi had knowledge or was

aware that damage had accrued. She placed this date as being 7 January 2013 relying on the case of *Goh Kiang Heng v. Hj Mohd Ali Hj Abd Majid* [1997] 4 CLJ Supp 320; [1997] 4 BLJ 320; [1998] 1 MLJ 615. Her reasoning however, is not in line with the case-law we have cited above. In other words, the learned judge erred in her application of the law in relation to when the cause of action accrued in negligence.

[94] She further failed to take into consideration the relevant facts in determining when time started to run.

[95] For the reasons we have cited above, it was clear to us at the hearing of this appeal that the claim against the defendant-solicitors namely Siva and Sharmni was caught by limitation. As we concluded that *Zamberi*'s cause of action was time-barred, the issue of the negligence of Siva and Sharmni did not arise for further consideration.

[96] The appeals namely Appeal No. P-02(NCVC)(W)-135-01-2017 and Appeal No. P-02(NCVC)(W)-134-01-2017 were therefore allowed and the orders of the High Court set aside. We ordered costs of RM13,000 subject to allocatur and the deposits to be refunded.